No. 16301

In the United States Court of Appeals for the Ninth Circuit

MORRISON-KNUDSEN, INC., HENRY J. KAISER, MACCO CORPORATION, AND B. PERINI & SONS, D/B/A KINGS RIVER CONSTRUCTORS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of Morrison-Knudsen, Inc., Henry J. Kaiser, Macco Corporation,[1] and B. Perini & Sons d/b/a Kings River Constructors (herein referred to as Morrison-Knudsen), pursuant to Section 10(f) of the National Labor Relations Act, as amended[2] (hereinafter called

[1] Although absent from the petition for review, the Board includes the Macco Corporation among the petitioners to conform with its decision and order and cross-application for enforcement.

[2] 61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Sec. 151, *et seq.* Relevant portions of the Act appear in Appendix, *infra*, pp. 20–22.

the Act), to review and set aside an order of the National Labor Relations Board (R. 43–48) issued against petitioners on October 17, 1958, pursuant to Section 10(c) of the Act. The Board in its answer to the petition has cross-petitioned for enforcement of its order (R. 55–57). This Court has jurisdiction of the proceeding under Section 10 (e) and (f) of the Act, the unfair labor practices having occurred in the general vicinity of Fresno, California, within this judicial circuit. The Board's decision and order are reported at 121 NLRB No. 179.

COUNTERSTATEMENT OF THE CASE

I. The Board's findings of fact [3]

The Board found that petitioners violated Section 8(a) (3) and (1) of the Act by refusing employment to M. E. Tuttle because of his failure to obtain clearance from Local 431 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter referred to as Teamsters or Union). The Board relied upon the following evidentiary facts.

A. Background

During the period here relevant petitioners were engaged in the construction of a powerhouse on the Kings River, known as the Black Rock project, some 60 miles outside of Fresno, California (R. 10–11; 179–180, 226, 176). The Morrison-Knudsen Company,

[3] The Board adopted the findings, conclusions, and recommendations of the Trial Examiner (R. 43). In the statement which follows, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

as the sponsoring partner of the project, was responsible for assembling the work crew and settling higher-level problems (R. 11; 176, 179–180, 265). Some of petitioners also participated in another joint venture known as the Wishon Dam project about 20 miles from Black Rock (R. 12, 13; 142–143, 173, 223–224). The Morrison-Knudsen Company was also the sponsoring partner at Wishon Dam (R. 175–176, 265–266). While both projects had its own project manager in charge of personnel, there was an exchange of employees between the two projects (R. 12, 13; 142–144, 145–146, 138).

To facilitate the hiring procedure and maintain harmonious relations with the local unions, both projects employed James Thomas Wolcott, as labor coordinator, with offices in Fresno (R. 13, 22; 224–226, 232–233, 236–237). Preliminary to starting the Black Rock project, Wolcott met with local union representatives, including Al Fudge, secretary of Local 431 of the Teamsters, to discuss with them manpower requirements and contemplated conditions of employment (R. 22; 232–233, 236–237, ~~Tr. 195–196~~).

B. The unfair labor practices

M. E. Tuttle had worked for several years as a warehouse clerk on Morrison-Knudsen projects [4] in Oregon and California (R. 11; 66, 87–88). In November 1956, he quit work at one of these projects near Sonora, California, to have some dental work done at Stockton (R. 11; 66, 87–88, 95, 86, 98). At

[4] The record does not indicate whether any of the petitioners other than Morrison-Knudsen participated in these projects.

that time, he was a member of Teamsters' Stockton Local 439 (R. 11; 66, 87–88).

Thereafter, when Tuttle started looking for work, he learned from a friend, Jack Sharp, then employed at Black Rock as a warehouse clerk, that Sharp was about to be transferred to petitioners' Wishon Dam project (R. 11–12; 68, 98–100, 135–136). Sharp suggested that Tuttle might replace him at Black Rock (R. 12; 67–68, 102, 138).

On the next day, February 23, 1957, Sharp and Tuttle went to Fresno where they interviewed Perkins, project manager at Wishon Dam, who had arranged for Sharp's transfer (R. 12; 68–69, 102, 136, 174–175, 177, 180–181). Sharp recommended Tuttle as his replacement at Black Rock and Perkins, who had known Tuttle on prior construction jobs and had observed his work, assumed that Tuttle would fill the vacancy (R. 12, 14; 103, 138–139, 172–173). He advised Tuttle to get his union card cleared by the Teamsters' Local 431 in Fresno, and warned Tuttle that he might have trouble with Al Fudge, secretary of Local 431, in having his card transferred from the Stockton local (R. 12; 71, 108, 138–139, 177–178). Perkins told Tuttle to present himself at Black Rock the following Monday (R. 12–13; 71). On the basis of this interview with Perkins and the knowledge that Perkins had been instrumental in arranging for Sharp's transfer to Wishon Dam, Tuttle assumed that Perkins was actually assigning him to the job (R. 13). Perkins' actual authority in recruiting personnel, however, was limited to the Wishon Dam project (R. 13; 178).

Following his talk with Perkins, and at the latter's suggestion, Tuttle went to the office of Labor Coordinator Wolcott in Fresno to place his application on file (R. 13; 71–72, 227).[5] Perkins went to Wolcott's office with Tuttle and, because Wolcott was absent or occupied, had Wolcott's secretary register Tuttle's application for the warehouse job at Black Rock (R. 13–14; 72, 107–108).

On the following Monday morning, February 25, Tuttle went to the Teamsters' office in Fresno where he saw Fudge, Local 431's secretary (R. 14; 72–73, 133, 108). He handed Fudge his union card and told him that Perkins had directed him to report for work at Black Rock that day (R. 14; 73–74). Fudge became very angry. He refused to accept the transfer of Tuttle's card from the Stockton local and clear him for the Black Rock job (R. 14; 73–74, 109–110). He told Tuttle that the Union already had more warehousemen than were needed (R. 14; 73, 109).

Despite his failure to get union clearance, Tuttle went to the Black Rock project that afternoon (R. 14; 74–75, 154–155). On the project, Sharp introduced him to John E. Atkins, the warehouse manager, who told Tuttle that "there must be some mistake" because Labor Coordinator Wolcott had another man coming

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[5] There was a considerable exchange of employees between the Black Rock and Wishon Dam projects and while each project had its own manager in charge of personnel, they jointly employed the Labor Coordinator and there was close cooperation between the two projects. Wolcott regarded Perkins and DeLay, the project manager at Black Rock, as his superiors and dealt directly with them in procuring needed personnel (R. 13, n. 2; 142, 145–146, 224, 225, 272).

for the job. He advised Tuttle to see Wolcott (R. 14; 75–76, 110–111, 113, 155–156). Prior to that day, Sharp had recommended Tuttle to Atkins for his job and Atkins had told Sharp to have Tuttle contact him (R. 14–15, 17; 186, 208, 211, 213–214). Atkins also had specifically requested his immediate superior, Office Manager Weatherman, to secure Tuttle for the job (R. 15, 17, 19; 190–192, 151, 163, 209–214). This was the usual hiring procedure in obtaining warehouse personnel (R. 15; 191–192, 199–201, 208–210). Atkins' status as a supervisor with authority to effectively recommend hiring and discharge was stipulated (R. 19; 134).

Shortly after the interview with Atkins, Tuttle saw Labor Coordinator Wolcott and advised him that Perkins had assigned him to the Black Rock job (R. 15; 76–77, 113–114). Wolcott replied that Perkins had no authority over Black Rock personnel (*ibid.*). He further told Tuttle that there was no vacancy then and that he would be contacted when an opening occurred (R. 16; 227–228, 229). During the interview Tuttle informed Wolcott that he was having trouble getting union clearance (R. 16; 227–228, 234).

Sometime after the Wolcott-Tuttle interview Jack DeLay, project manager at Black Rock, asked Wolcott to "get him a good warehouseman" (R. 16, 20; 274–275). Wolcott thereupon got in touch with Union Agent Fudge, and one Myers was then hired directly through the Union, without the recommendation of Atkins or any other company official, to fill the vacancy caused by Sharp's transfer (R. 16, 20; 212–214,

238–239, 253–255). Petitioner's records show that Myers was hired on February 28, several days after Tuttle had placed his application on file with Wolcott, and 3 days after he had been to Black Rock seeking the warehouse job (R. 16, 20; 262, 273–274). Myers went to work at Black Rock during the first week of March (R. 16; 261–262, 160–161).

Upon learning who had been hired to fill the vacancy at Black Rock, Tuttle went to Fudge's home to protest the Union's clearance of Myers rather than himself (R. 16; 77–79, 116–118).[6] Fudge angrily rebuked Tuttle for attempting to interfere with Fudge's business and told him not to come to Fudge's house again (R. 16–17; 79, 119). Later another employee, Maples, attempted to ascertain from Fudge why Tuttle was not cleared for employment at Black Rock and Fudge replied, sarcastically, that he could not have such a young man (Tuttle was 70 years old) telling him how to run his business (R. 21; 152–153, 95). Despite his failure to obtain union clearance, Tuttle continued his efforts to obtain work at Black Rock (R. 17; 121–123, 83–84). He repeatedly saw Wolcott but received no encouragement for future employment (R. 17; 123–125, 229–230, 84).

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[6] Tuttle had been told by friends who worked at the warehouse that the new man who was working in Sharp's place had not been a member of the Union before coming to Black Rock (R. 117). Tuttle protested to Fudge that the new man "was a bartender before he come here"; "that he took out a permit or joined here, that he didn't carry no former warehouseman's card" and that he should not have been referred in preference to Tuttle (R. 16; 78–79).

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On March 6 or 7, Tuttle again saw Atkins at the Black Rock project and the latter advised him that there still was no vacancy (R. 17; 81–82, 189). Atkins informed Tuttle that he had put in a "requisition" initially for Tuttle by name before the hiring of Myers, and indicated that Tuttle had not gotten the Black Rock job because of Fudge's refusal to clear him (R. 17; 82–83, 119, 131–133, 149, 151, 161–162, 208–214, 288). He told Tuttle, "I called you by name and Al Fudge said that you wasn't available for any job on this, on any of these jobs up here" (R. 82). He also advised Tuttle "to go down and talk to [Fudge] real nice and see if you can't get him to clear you" (R. 17; 288–289).

After about 2 weeks' employment at Black Rock, Myers, Sharp's replacement, left and another employee, Ryan, who had previously worked under Atkins, was hired to take his place (R. 18; 150–151, 192–194). Atkins was instrumental in hiring Ryan (R. 18, 20; 192–194). He personally called the Los Angeles office, where Ryan was then employed, to ascertain whether he would be available to work at Black Rock (R. 18; 193, 210). On being told of Ryan's availability, he informed Office Manager Weatherman that he would like to have Ryan as a warehouse clerk (R. 18; 193–194). The Union cleared him (R. 18; 211–239, 254–255, 246).

Early in April, Wolcott, on learning that Maples, another warehouse clerk at Black Rock, planned to resign, telephoned Tuttle and told him of the vacancy. He informed Tuttle that he had him "in mind" to

fill it, and that he would be contacted later with respect to the job (R. 18–19; 84–85, 230–231). Before making Tuttle this tentative offer, Wolcott discussed the matter with Fudge, who told him, in effect, "that is fine with me" or that the decision was up to Wolcott (R. 19; 260–261, 279–280). The tentative offer of a job never materialized, however, because of the discontinuance of the night shifts, and Tuttle was never actually employed at Black Rock (R. 19; 196, 197, 279, 154, 212).

II. The Board's conclusions and order

Upon the foregoing facts, the Board concluded that petitioners violated 8(a) (3) and (1) of the Act by refusing to hire Tuttle because of his failure to obtain clearance from Local 431 of the Teamsters.

The Board ordered petitioners to cease and desist from the unfair labor practices found and from in any other manner, interfering with, restraining or coercing employees or applicants for employment in the exercise of their rights guaranteed under Section 7 of the Act (R. 44–45). Affirmatively, the Board ordered petitioners to offer employment to Tuttle and make him whole for any loss of earnings (less any sum of money already paid)[7] because of petitioners' discrimination, and to post appropriate notices (R. 45–46).

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[7] A settlement of a charge filed by Tuttle against Local 431, calling for the payment of a sum of money to Tuttle by Local 431, had been effectuated prior to the hearing (R. 23, n. 4; 127–131).

ARGUMENT

I. Substantial evidence supports the Board's findings that petitioners, in violation of Section 8(a) (3) and (1) of the Act, refused to hire Tuttle because he was unable to obtain union clearance

It is undisputed that when Tuttle informed Local 431's business agent, Fudge, that he had been told by Perkins to report to work at the warehouse clerk's job at Black Rock, and asked Fudge to transfer his local card and clear him for the job, Fudge became very angry and refused to grant the transfer and clearance, telling Tuttle that Local 431 already had more warehousemen than were needed. It is not clear whether Fudge's objection to transferring Tuttle's card and clearing him for the job resulted from his resentment over Tuttle's attempt to obtain the job without first reporting to the Union, from a policy against permitting men from other locals to obtain jobs for which unemployed members of Local 431 were eligible, or from a combination of these reasons. The Union, of course, could not lawfully have caused petitioners to deny employment to Tuttle for any of those reasons.[8] In these circumstances, regardless of whether petitioners were aware of the reasons motivating Fudge in refusing to clear Tuttle, petitioners could not lawfully refuse to hire Tuttle because of his lack of union clearance. Indeed, petitioners do not dispute that if, as the Board found, their refusal to

[8] See, e.g., *N.L.R.B.* v. *International Longshoremen's and Warehousemen's Union*, 210 F. 2d 581, 583 (C.A. 9); *N.L.R.B.* v. *Local 542, International Union of Operating Engineers*, 255 F. 2d 703, 704–705 (C.A. 3); *N.L.R.B.* v. *Pacific Intermountain Express Co.*, 228 F. 2d 170, 173–174 (C.A. 8).

hire Tuttle was because of his lack of union clearance, their conduct was in contravention of Section 8(a) (3) and (1) of the statute. Discrimination of this nature unquestionably restrains and coerces employees in the exercise of their right to perform or refrain from performing union obligations or supposed obligations and inherently encourages union membership in the broad sense. *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40–42, 45, 54; *N.L.R.B.* v. *Local 743, Carpenters (General Electric Co.)*, 202 F. 2d 516, 518 (C.A. 9); *N.L.R.B.* v. *Shuck Construction Co.*, 243 F. 2d 519, 520–521 (C.A. 9); *N.L.R.B.* v. *Thomas Rigging Co.*, 211 F. 2d 153, 156–157 (C.A. 9), certiorari denied, 348 U.S. 871.

Accordingly, the sole issue is whether substantial evidence supports the Board's finding that petitioners refused employment to Tuttle because he was unable to obtain union clearance.

The evidence summarized in the Counterstatement, *supra,* amply supports the Board's finding that petitioners refused to hire Tuttle for that reason. It shows that Atkins' the warehouse manager at Black Rock, who admittedly had authority effectively to recommend the hire and discharge of employees, specificially asked his immediate superior, Office Manager Weatherman, to obtain Tuttle for the warehouse clerk's job. In making the request, Atkins was following the usual procedure for obtaining warehouse personnel. This request was made prior to the time when Tuttle on February 25 interviewed the Union's business agent and incurred his displeasure.

Nevertheless, when Tuttle later in the day on February 25 spoke to Atkins about the job which his friend Sharp was leaving, Atkins told him that it was already filled. He was similarly advised by Labor Coordinator Wolcott, whom he next interviewed. The job, however, had not in fact been filled. Wolcott conceded that it was *subsequent* to his interview with Tuttle that the Black Rock projects manager asked Wolcott to get him a good warehouse clerk.[9] Wolcott—instead of hiring Tuttle, whom Atkins had recommended, but who, Wolcott knew, had incurred the union business agent's displeasure—requested the Union's agent to send him a warehouse clerk and the latter sent him Myers, whom petitioners had not specifically requested and who had not even applied for the job (R. 275). Myers was hired on February 28—three days after both Atkins and Wolcott had told Tuttle that the job was already filled—and he did not report for work until the first week in March when Sharp left for the Wishon Dam project. Furthermore, Myers worked for only about two weeks and petitioners again passed over Tuttle, who they knew was still available for employment, and obtained, instead, an employee from Los Angeles, whom the Union cleared. In these circumstances, the Board reasonably found that Atkins and Wolcott falsely told Tuttle on February 25 that a replacement for Sharp had al-

[9] Since, as Wolcott testified and the Board found (R. 16; 274–275), Wolcott did not request Fudge to obtain a replacement for Sharp until several days after the Tuttle-Wolcott interview, there is obviously no merit to petitioners' suggestion (Br. p. 23) that Myers had been promised the job prior to February 25.

ready been hired because they had learned of Fudge's unwillingness to clear Tuttle.

Petitioners' treatment of Tuttle was, moreover, consistent with their practice of requiring that applicants for employment be cleared through the Union (R. 21; 70–71, 110, 176–178, 200–204, 211, 237–239, 246–248, 254–255, 260, 217). Indeed, Project Manager Perkins at the Wishon project advised Tuttle to clear through the Union because that was the "normal procedure" (R. 21; 177–178). And Warehouse Manager Atkins at Black Rock, in obvious recognition of this practice, advised Tuttle to talk to Fudge "real nice" and see if Tuttle could not persuade Fudge to clear him (R. 17; 288–289). Furthermore, as we have seen, Atkins indicated to Tuttle that it was Fudge's refusal to clear him which had resulted in Tuttle's failure to obtain employment at Black Rock.

The Board properly discounted petitioners' attempt to minimize the significance of Atkins' request that Tuttle be hired for the warehouse clerk's job. As the Board pointed out, it was stipulated at the hearing that Atkins was a supervisor with authority effectively to recommend in matters of hiring and discharging, and although Atkins testified that his recommendations with respect to hiring were followed only about half the time, the record shows only one instance when his recommendation was overruled—an occasion when the son of his immediate superior was hired (R. 19–20; 218–220). Admittedly warehouse clerks Maples and Ryan were hired on his recommendation (R. 20; 147, 199–200, 192–194). Myers, however, was

hired instead of Tuttle "not on the strength of anybody's recommendation but through clearance with Fudge" (R. 20).

In their brief to this Court, petitioners take sharp issue with the Trial Examiner's credibility findings, adopted by the Board. Indeed, petitioners argue that the Board should not have credited two of their own witnesses, Warehouse Manager Atkins and Labor Coordinator Wolcott, on several significant points.

For example, despite Atkins repeated and unwavering affirmation that it was *prior* to February 25 that he had specifically requested Office Manager Weatherman to obtain Tuttle as Sharp's replacement (R. 186, 190–191, 208–209, 211) and petitioners' failure to call Weatherman to refute this testimony, petitioners now urge that Atkins' recollection must be faulty (Br. p. 24). Petitioners forget that credibility issues are for the Trial Examiner and Board to determine and should rarely be disturbed by the Courts. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 494–496. In any event, the exact time when Atkins first learned of Tuttle's availability assumes significance only in its relationship to the sequence of events. The record, as already shown, amply supports the Board's finding that Atkins learned of Tuttle's availability and specifically requested that Tuttle be hired some time before Fudge prevented Tuttle from obtaining the job by refusing to clear him. Petitioners' suggestion (Br. p. 21) that because of the Black Rock project's remoteness from Fudge's headquarters, Atkins could not have learned of Fudge's objection to Tuttle be-

fore Atkins told Sharp on February 25 that the latter's replacement had already been hired, ignores the fact that the telephone, a logical means of communication, was available at the project (R. 75–76, 132, 163, 230).

Petitioner also contended that the Board improperly credited Labor Coordinator Wolcott's testimony to the effect that it was several days *after* his first interview with Tuttle that he received a request to obtain a replacement for Sharp and called upon Fudge to furnish such replacement (Br. p. 23). Wolcott, however, was very positive on this point (R. 274–275) and his testimony ties in with petitioners' records which show that Sharp's replacement, Myers, had not, as petitioner contends, already been hired by February 25 but that he was, instead, hired on February 28 and reported for work during the first week in March when Sharp left. Wolcott's testimony is, moreover, consistent with Atkins' explanation to Tuttle that Fudge had refused to clear him and Atkins' advice to Tuttle "to go down and talk to [Fudge] real nice and see if you can't get him to clear you" (R. 17; 288–289). Thus, aside from the fact that the Trial Examiner, who saw and heard the witnesses and lived with the case, is in the best position to resolve credibility issues, his acceptance of Wolcott's testimony was warranted as a logical explanation of what happened in the light of other evidence showing that union clearance was customarily required by petitioner as a condition of employment.

II. The Board's order is valid and proper

Petitioners assert that paragraph 1(b) of the Board's order is too broad in scope. It requires petitioners to cease and desist from "in any other manner" violating Section 8(a)(1) of the statute. In view of the nature of petitioners' offense—a discriminatory refusal to hire, in violation of Section 8(a) (3) and (1) of the Act—we submit that the Board's order was not an abuse of its discretion.

Insofar as the Board found that petitioners' conduct was violative of Section 8(a)(1) of the Act, the Board properly directed petitioners to cease and desist from interfering with, restraining or coercing employees, or applicants for employment, in the exercise of their Section 7 rights. The discriminatory refusal on the part of petitioners to hire Tuttle goes to the very heart of the Act and justifies the Board's determination that a repetition by petitioners of a violation of that section in the future may be anticipated by reason of their unlawful conduct (R. 44, n. 1). *N.L.R.B.* v. *Entwistle Mfg. Co.,* 120 F. 2d 532, 536 (C.A. 4). The serious nature of the unfair labor practices which the Board found petitioners committed fully warrants the Board's determination that a broad cease and desist order is necessary "to prevent the [petitioners] * * * from engaging in any unfair labor practice affecting commerce." *May Dept. Stores* v. *N.L.R.B.,* 326 U.S. 376, 390. It constitutes a reasonable exercise of the Board's authority "to prevent violations, the threat of which in the future is indicated because of their similarity or re-

lation to those unlawful acts which the Board has found have been committed by the employer in the past." *N.L.R.B.* v. *Express Pub. Co.,* 312 U.S. 426, 436–437. In view of the record showing *supra,* p. 13, that union clearance was a customary procedure, there are reasonable grounds to anticipate that petitioners will infringe upon other rights guaranteed employees in the future unless appropriately restrained. The petitioners struck not only at the particular right involved but all the interdependent and related guarantees which support and surround the particular right involved (see *N.L.R.B.* v. *Philadelphia Iron Works, Inc.,* 211 F. 2d 937, 944 (C.A. 3)).

Finally, petitioners request this Court to modify the Board's order by striking the provision which requires petitioners to offer Tuttle immediate employment and further, to limit the back-pay period to on or about April 12, 1957, the date on which petitioners abolished its night shift. There is no merit to this request. Sharp, for whom Tuttle would have been hired as a replacement but for the Union's refusal to clear him, was working on the day shift (R. 75, 136, 137, 149). When he left, Maples, who had been working on the swing shift, stepped into the day shift job and Myers took the swing shift job (R. 149, 158). Both Maples and Myers, however, had left petitioners' employ by the time the night shifts were eliminated (R. 150, 196) and there is no reason to assume that Tuttle would not have been working on the day shift at that time if he had been hired. In any event, questions such as that now raised by peti-

tioners are appropriately handled in subsequent administrative proceedings before the Board and petitioners will have a further opportunity to demonstrate the period, if any, during which curtailment of its operations would affect or eliminate back-pay liability to Tuttle in the subsequent compliance proceedings. *N.L.R.B.* v. *Rutter-Rex Mfg. Co.,* 245 F. 2d 594, 598 (C.A. 5); *N.L.R.B.* v. *Reliance Clay Products Co.,* 245 F. 2d 599, 600 (C.A. 5); *N.L.R.B.* v. *Cambria Clay Prod. Co.,* 215 F. 2d 48, 56 (C.A. 6) (and cases cited therein). General orders of this sort entered by the Board with respect to back pay and offers of immediate employment manifestly contemplate further administrative action on its part, i.e., determination of the exact amount of back pay to be tendered and determination as to what positions are available and substantially equivalent for the purposes of the remedy ordered. *Home Beneficial Life Ins. Co.* v. *N.L.R.B.,* 172 F. 2d 62, 63 (C.A. 4) certiorari denied, 332 U.S. 756. If in fact there is no position available for Tuttle, the Board, under its reservation of jurisdiction, can conform its ultimate "immediate employment" and back-pay order to meet that situation. *N.L.R.B.* v. *Brown & Root, Inc.,* 203 F. 2d 139, 147 (C.A. 8); cf. *Wallace Corporation* v. *N.L.R.B.,* 159 F. 2d 952, 954 (C.A. 4) affirmed 332 U.S. 248; *N.L.R.B.* v. *Bird Machine Co.,* 174 F. 2d 404, 405–406 (C.A. 1).

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that the petition to review should be denied, and that a decree should issue enforcing the Board's order in full.

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JUNE 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided

in section 2112 of title 28, United States Code, Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the

Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

U.S. GOVERNMENT PRINTING OFFICE: 1959